

March 2, 2017

BY EMAIL

Commissioner Liane Randolph
Commissioner Clifford Rechtschaffen
California Public Utilities Commission
505 Van Ness Ave.
San Francisco, CA 94102

Re: Comments on Draft Proposed Modifications to Rules of Practice and Procedure

Dear Commissioners Randolph and Rechtschaffen:

As directed by the Notice on the webpage for the Committee on Policy and Governance, the firm of Goodin, MacBride, Squeri & Day, LLP hereby submits comments on the Draft Proposed Modifications to the Commission's Rules of Practice and Procedure that will be on the agenda at your March 8th meeting of the Committee. Our firm has a long standing practice before the Commission on behalf of a wide variety of clients, and we appreciate the opportunity to participate in the process of implementing the new rules promulgated by SB 215.

Let us first state that we support the Commission's effort to update its Rules of Practice and Procedure, and greatly appreciate the effort involved in developing rules to implement the new ex parte rules adopted in SB 215 in the last Legislative session. The draft proposed rules which address the new requirements of SB 215 appear to be generally practical and well considered. We do, however, wish to offer several comments and suggestions for your consideration.

1. Rule 8.1(b): SB 215 states that "[t]he commission shall, by rule, explicitly ban both of the following: (A) The practice of one-way ex parte communications from a decisionmaker to an interested person...." This portion of the statute was ostensibly fashioned to respond situations in which the use of one-way communications from a decisionmaker to an interested party may have been used as a means to avoid reporting

an ex parte communication. However, the preamble to proposed Rule 8.1(b) states that the Commission interprets that portion of SB 215 to require the Commission to provide “clarification” that such communications are not exempt from the definition of “ex parte communication”. That description of legislative intent, we submit, falls short of what was plainly intended. The ban on one-way communications should be explicitly stated, as is the case with the ban on ex parte communications in adjudicatory cases. The language proposed in Rule 8.1(b) is worth retaining as one-way ex parte communications are clearly a type of ex parte communications, and such communications must be reported if they occur in the case of a violation of the ban. However, we recommend that specific language be added in the form of an additional sentence at the end of proposed Rule 8.2(f): **“One-way ex parte communications from a decisionmaker to an interested party are prohibited, but must be reported pursuant to Rule 8.3 if they occur.”**

2. Rule 8.1(f): We recommend that the definition of “Procedural matter” be expanded to include routine situations where a party is permitted by the rules to seek permission from the Administrative Law Judge to exercise a right or take an action contemplated by the Rules of Practice and Procedure. Examples include the need to ask the ALJ for permission to file a reply to a response to a motion, as described in Rule 11.1(f). Replies to responses to motions are allowed, but only with the permission of the ALJ. Similarly, a party filing a Petition for Modification may file a reply to a response filed to the Petition, with the permission of the ALJ. See Rule 16.4 (g). Such routine inquiries should not require a three day notice to communicate with the ALJ, followed by the filing of an ex parte notice. Accordingly, we recommend that a new subsection (iv) be added to proposed Rule 8.1(f) to read: **“any matter which requires a party to seek the permission of the assigned Administrative Law Judge to take an action contemplated by the Rules of Practice and Procedure.”**

3. Proposed Rule 8.2 (c): We suggest a correction to an inadvertent error in this rule. The first sentence should be revised to read, “In any ratesetting proceeding, ex parte **communications** are permitted....” The word “restrictions” should be replaced.
4. Rule 8.2(c)(2)(C) We recommend two clarifications in this rule. First, it should be clarified that the ban on ex parte communications extends not only for the three working days preceding the day of the Commission voting meeting, but also to the day of the voting meeting itself. This should be self-evident if the intent of the rule is to prevent last minute communications which other parties would not learn of until after Commission action on an agenda item. Secondly, we believe it would be appropriate to clarify that “the Commission’s scheduled vote on the decision in the proceeding” must refer to the proceeding which is the subject of the ex parte communication. There are a number of ways to phrase such clarifications. We suggest that the rule read as follows: **“Individual oral ex parte communications related to a matter on the Commission’s agenda are not permitted during the period commencing three working days before the Commission’s scheduled vote on a decision in the relevant proceeding and extending until after the Commission’s voting meeting concludes.”**
5. Rule 8.2(c)(3)(B): We strongly endorse the recommendation in the proposed rules to ensure that written ex parte communications are not subject to a redundant requirement to file a notice of written ex parte communications when the document has already been served on all parties. We recommend that one modification be made to the Rule 8.2(c)(3)(B) to add a sentence at the end of the Rule stating, **“Service of written ex parte communications shall be made as provided under Rule 1.9(a).”** Rule 1.9(a) requires service to all parties and to the assigned Administrative Law Judge. As written ex parte communications will increasingly be used to address issues related to revisions to Proposed Decisions or Alternates (see Item 9 below), it is important that the ALJ be provided with such written ex parte communications.
6. Rule 8.2 (j) In considering both SB 215 and the proposed Rule 8.2(j) which provides for the Commission to impose civil sanctions for violations of the ex parte rules, we note that

there is no discussion of any standard for application of the sanctions, nor discussion of the factors that the Commission may consider in determining whether to impose any particular penalty from the range of moderate to extremely severe financial or injunctive penalties authorized by SB 215. The Commission may well wish to consider including some guidance in the rules, such as the following: **“In imposing any sanctions under this rule the Commission shall accept and consider evidence, both from the party accused of the violation, and from other parties, as to whether the violation was intentional or inadvertent, the degree of harm to the public interest from the violation, evidence of any previous violations, and any other relevant considerations regarding the severity of the violation, before imposing civil sanctions.”**

7. Rule 8.3(a)(3) SB 215 contains several ambiguous terms describing what an interested party must include in a report of an oral ex parte communication, including, “its content”, “the topic of the conversation, including any applicable proceeding numbers”, and “a brief description of the communication.” Under the existing rules, many parties filed ex parte notices notable for their lack of useful specificity regarding what was actually said in the ex parte communication. Yet proposed Rule 8.3(a)(3) simply requires “a description of the interested person’s communication and its content....” This is not an improvement on either the current standard nor the language in SB 215. While most parties would not support a rule which required excessive detail or a verbatim transcript of oral ex parte communications, we recommend that the Commission consider expressing the intent that parties are responsible for making a reasonable effort to provide a complete summary of the key points of discussion in any oral ex parte communication. Accordingly, we suggest replacing the phrase “and its content” in proposed Rule 8.3(a)(3) with the following text, **“, including a summary of all of the points or arguments made in the communication, together with any request, recommendation or advice provided to the decisionmaker”**[to be followed by the remainder of the proposed Rule].

8. Rule 14.5: We recognize that tying the comment period for a Draft or Alternative Draft Resolution to the date of notice of the item in the Daily Calendar may seem like a reasonable and efficient suggestion, but the Commission should recognize that this will require parties to spend a good deal of time checking yet another portion of the Calendar for notices that will likely be few and far between. As the Commission moves toward more complete offering of its records and documents on its website, it is important to continue to make use of mechanisms that enhance the ability of parties to efficiently access the large amount of information that the Commission produces. This proposed Rule presents a good example. If proposed Rule 14.5 is adopted, **we recommend that the Commission establish an additional subscription service announcing draft resolutions and alternative draft resolutions**, just like the ones it now offers for parties to subscribe to receive news of the issuance of new energy or telecom orders, proposed decisions, or filings by parties. Once advised of the issuance of a new draft resolution by an email to all the subscribers, it would be simple for parties to refer to the issuance date in the calendar to calculate when comments were due. We recognize that the creation of an additional subscription service may be slightly outside of the scope of the proposed rules, but it should be within the scope of the Policy and Governance Committee's responsibilities, and we strongly recommend that it be considered in this instance.
9. We wish to offer one other proposal for a modification to the Commission's procedures which is not strictly part of the Rules of Practice and Procedure, but which is closely tied to Rule 8.2(c)(2)(C). The frequency of last minute ex parte communications in recent years, particularly during the last few days prior to a Commission voting meeting, was due to the large number of revisions to Proposed Decisions and Alternate Proposed Decisions. The significant number of Commission agenda items and the length and complexity of the decisions themselves made it far more difficult for them to be carefully proofread and cross-checked against previous decisions in related dockets for consistency. In addition, the large number of parties in proceedings, each with different interests, often identified their own issues with decisions and raised them in comments and reply comments, with the latter coming only days before a vote is scheduled on the

item. As a result, revisions incorporating these last minute comments and reply comments are often issued just before a scheduled vote, and they frequently provoke other parties into seeking last minute changes. Under the provisions of SB 215, such last minute changes can no longer be sought through oral ex parte communications during the last three days before a scheduled vote on the item.

However, the problem remains that parties need to know about revisions, and if there are errors, they need to bring them to the attention of the Commission, in writing, under the rules adopted in SB 215. Accordingly, **we recommend that the Commission adopt a standard procedure to have the Process Office serve all revisions to Proposed Decisions and Alternate Proposed Decisions on all parties to the service list by email at the same time that the revisions are posted to the Agenda on the Commission website**, which is the only manner in which such revisions are currently made public.

The procedure proposed above would impose an additional task on the ALJ division and the Process Office, but it is entirely consistent with the Commission's continued movement to a fully integrated web-based filing and information system for conducting the Commission's business. Indeed, there are several other rule changes proposed with this draft modification to the rules that reflect the almost complete transformation of practice at the Commission to the use of web access and electronic documents for every significant function.

One of the proposed draft rules will require electronic filing for all documents (except those filed under seal). (Rule 1.13.) Another will require the uploading of testimony and exhibits to the Commission's electronic filing system. (Rule 13.7(f).) Another rule will eliminate the requirement for parties to serve hard copies of documents on state service parties, who will now receive electronic copies like all other parties. (Rule 1.9(f).)

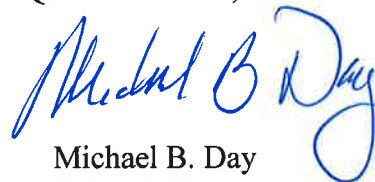
As virtually all parties provide the Commission with an email address for the service list maintained by the Process Office, once a Revision is approved for release by addition to the Agenda on the Commission's website, it should only require two steps--transmission

to the Process Office, and emailing to the Service List--for all parties to receive it. This immediate disclosure of revisions will enhance transparency, and will help avoid errors in decisions, as more parties will review revisions in a more timely manner. We do not believe this will create undue problems for the Commission's orderly processing of its Agenda. If errors in decisions are noticed, all parties will be notified in writing at the same time. Parties may agree or disagree about whether the revision needs correction, but the issue will be addressed out in the open, rather than discussed in an unreported oral ex parte contact. That is fully consistent with the intent of SB 215.

We appreciate your consideration of our suggestions and recommendations for the Draft Proposed Modifications to the Rules of Practice and Procedure. We will appear at the March 8th meeting of the Policy and Governance Committee and would be happy to answer any questions regarding our recommendations. Once again, we wish to express our appreciation to you the Commissioners, and to the Administrative Law Judges, attorneys, and other staff who are participating in this effort to revise the Rules of Practice and Procedure to comply with SB 215 and better meet the demands of current Commission practice.

Very truly yours,

GOODIN, MACBRIDE,
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CC: ALJ Hallie Yacknin